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No. 95-1381

In the Supreme Court of the United States

OCTOBER TERM, 1995

VILLAGE OF AIRMONT, NEW YORK, ET AL., PETITIONERS

v.

RABBI YITZCHOK LEBLANC-STERNBERG, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the evidence justified a jury verdict finding that petitioners had violated the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, in that they intentionally discriminated against respondents and other Orthodox and Hasidic Jews by enacting a zoning ordinance for the purpose of excluding places of worship necessary to the practice of their religion.

2. Whether the court of appeals correctly held that respondents' claims warranted injunctive relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a)[1] is reported at 67 F.3d 412. The opinions of the district court (Supp. Pet. App. 51a-56a, 57a-89a) are reported at 846 F. Supp. 294 and 839 F. Supp. 1054, respectively.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1995. A petition for rehearing was denied on November 28, 1995. Pet. App. 50a. The

[1] The appendix to the petition does not include the last page of the court of appeals' opinion. It is attached as an appendix to the LeBlanc-Sternberg Brief in Opposition.

petition for a writ of certiorari was filed on February 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This litigation arose out of the incorporation of the Village of Airmont, New York, in 1991. Prior to incorporation, the Airmont community was an unincorporated area of the Town of Ramapo, New York. During the 1980s, the number of Orthodox Jews (including Hasidic Jews, a subgroup of Orthodox Jewry) residing in Ramapo increased dramatically. Pet. App. 7a. In most residential areas, however, Ramapo's zoning code would not allow a place of worship to be located on a lot of less than two acres, and "[c]onstruction of a synagogue on such a lot would cost as much as $750,000, an expenditure that would require the support of approximately 150 families, far beyond the number of Orthodox Jewish families living near each other in Airmont." *Id.* at 8a. Unlike adherents of other religious faiths, Orthodox Jews cannot travel substantial distances to a place of worship for services or prayer because the tenets of their religion do not permit them to use mechanical means of transportation on the Sabbath or on certain religious holidays. *Id.* at 7a. Strict observance by Orthodox Jews also requires daily worship, and certain prayers may be said only if a "minyan," a group of ten males at or above the age of thirteen, is present. *Ibid.* As a consequence, Orthodox Jews must live within walking distance of a place where they can congregate for worship. *Id.* at 7a-8a.

In the mid-1980s, Ramapo accommodated the needs of Orthodox Jews for a place of worship near their homes by relying on a provision of its zoning code

regarding "home professional office[s]," which permits members of certain "learned professions," including clergy, to operate offices within their homes, subject to certain restrictions. Pet. App. 8a. Ramapo interpreted the zoning code provision to permit rabbis to conduct worship services in their homes, subject to limitations on the number of persons who could gather at any given time. *Id.* at 8a-9a. Ramapo also enacted a change in its zoning code to permit multi-family dwellings in a small section of town where a group of Hasidic Jews resided. *Id.* at 9a.

When a group of Hasidic Jews purchased another parcel of land in the Airmont area, a group of Ramapo residents from that area, who were members of the Airmont Civic Association (ACA), began efforts to incorporate Airmont as a village. As an incorporated village, separate from Ramapo, Airmont would be able to have its own zoning code. Pet. App. 9a.

The ACA sought incorporation as a village with the expressed intent of keeping Orthodox and Hasidic Jews out of the Airmont community. Pet. App. 9a-10a. For example, at an ACA meeting in August, 1986, ACA leaders read aloud a response to a poll conducted by the ACA of Airmont residents that stated:

> [W]hat would be better, for us to loose [*sic*] our homes for a religious sect or for us to live as we have lived for the past 25 years * * *.
>
> * * * * *
>
> * * * [L]et the people in the unincorporated Area of Ramapo, go ahead and fight for what they believe in. Instead of giving up for what we've worked very hard for, to a bunch of people who insist on living in the past. I am not prejudice [*sic*]

> in any way, shape or form but i [*sic*] *will not* have a hasidic community in my backyard.

Id. at 10a. (emphasis in original). The minutes of the same meeting reported predictions of "a grim picture of a Hasidic belt from Rockland through Orange & Sullivan counties." *Ibid.* At an ACA meeting shortly after the land purchase, an attendee stated that "everybody knows * * * why the Airmont Civic Association was formed. What does the Airmont Civic Association and the proposed village plan to do to keep these Hasidum [*sic*] out?" *Ibid.* The ACA's original president, James Filenbaum, told the developer of the Hasidic Jews' land parcel that "the reason of forming this village is to keep people like you out of this neighborhood." *Ibid.* At another ACA meeting, an attendee stated that "the only reason we formed this village is to keep those Jews from Williamsburg [a Hasidic community in Brooklyn, New York] out of here." *Id.* at 11a.

A referendum on incorporation of Airmont was held on January 30, 1989, and the vote was in favor of incorporation by a margin of 3 to 1. Pet. App. 11a. Formal incorporation was delayed, however, by litigation in state court challenging the manner in which the referendum was conducted. Meanwhile, the ACA continued to oppose actions by the Town of Ramapo to approve zoning variances that would allow Orthodox Jewish houses of worship. For example, ACA opposition, including litigation in state court, delayed the Town's approval of an application by a rabbi to construct a free-standing synagogue on a lot that was 1.926 acres, slightly under the two-acre minimum required by the zoning code. *Id.* at 13a.

In addition, ACA members went before the Ramapo Planning Board to oppose respondent Rabbi LeBlanc-Sternberg's application to conduct worship services in his home. In the course of doing so, they expressed anti-Orthodox sentiments and stated that Orthodox Jews should not have moved into the area, since they knew when they did so that there were no houses of worship. Pet. App. 13a-14a. Ramapo initially denied the application, then twice approved it, but the ACA financed two successful state court challenges to the approvals. *Id.* at 14a. Ramapo approved the application for a third time, including certain restrictions on the number of congregants and restricting home worship to Jewish holidays and the Sabbath. *Ibid.* By then, the Village of Airmont was incorporated and it decided not to pursue a third state court challenge. A village trustee and former ACA board member stated that the Village did not need to pursue another state court challenge since "there are other ways we can harass them." *Ibid.* An ACA member, who was later appointed to the Airmont Planning Board, and others stationed themselves outside Rabbi LeBlanc-Sternberg's house to count the number of congregants (*ibid.*), and "conducted surveillances of Orthodox Jewish homes at prayer times" (*id.* at 16a).

2. a. The Village of Airmont was formally incorporated on April 10, 1991. Pet. App. 11a. On April 12, 1991, the private respondents, a group of Orthodox Jewish residents of the Village of Airmont, including Rabbi LeBlanc-Sternberg, filed a complaint in the United States District Court for the Southern District of New York, against the Village, the ACA, Ramapo and several leaders of the incorporation movement, claiming that the incorporation of the Village had been undertaken for the purpose of

excluding Orthodox Jews, in violation of various federal laws, including the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, and the First Amendment. They sought damages and injunctive relief, and moved preliminarily to enjoin the election of the Village mayor and board of trustees that was scheduled for May 16, 1991. Pet. App. 12a. The district court denied an injunction on the grounds that respondents had failed to establish irreparable harm. *LeBlanc-Sternberg* v. *Fletcher*, 763 F. Supp. 1246, 1250-1252 (S.D.N.Y. 1991). Shortly thereafter, the ACA's slate of candidates was elected and took office as the Village Mayor and the members of its Board of Trustees. Pet. App. 12a.

On December 17, 1991, the United States filed suit against the ACA, the Village, and the Village trustees in their official capacities, alleging that the incorporation of Airmont had been accomplished "for the purpose of excluding Orthodox Jews" from the Village by, *inter alia*, imposing burdensome zoning and other restrictions upon Orthodox Jewish places of worship in the Village, in violation of the FHA. The United States sought declaratory and injunctive relief. Pet. App. 12a.

In January, 1993, the Village of Airmont adopted a zoning code. Pet. App. 14a. The code contained several modifications of the "home professional office" provision of the Ramapo zoning code and stated the Village's intention that that provision "not generate activities that come into a residential area so as to detract from the residential character of the area." *Id.* at 15a. The Village appointed a board of appeals and a planning board to interpret and apply the code. One of the appointed board members was an ACA member who had stated that most persons were

opposed to home houses of worship; he also had participated in the surveillance of Orthodox Jewish homes at prayer time. *Id.* at 15a-16a. The mayor and three of the four trustees who adopted the zoning code all "testified at trial that they were opposed to the Ramapo-type interpretation of the [home professional office] provision to allow worship services in the homes of clergy." *Id.* at 16a. Respondents contended that, in light of the circumstances surrounding the adoption of the zoning provision, the interpretation it would be given was a foregone conclusion. See *ibid.*

b. The two cases were consolidated and proceeded to trial.[2] The damages claims by the private respondents were tried to a jury at the request of petitioners; the government's suit was tried to the court. Pet. App. 12a-13a.[3] On December 13, 1993, after eight weeks of trial and a week of deliberations, the jury returned a verdict against the Village, finding that it had violated private respondents' rights under the FHA and had conspired to violate their rights under the First Amendment. *Id.* at 18a-19a. The jury awarded no damages. *Id.* at 19a. The jury returned a verdict in favor of the individual defendants. *Id.* at 18a.

Two days after the jury verdict, the district court dismissed the government's suit. Pet. App. 19a; Supp.

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[2] On December 24, 1991, the district court had denied petitioners' motion to dismiss the private suit, rejecting, *inter alia*, petitioners' challenge to the private respondents' standing, to the justiciability of their claims, and to their statement of a cause of action. *LeBlanc-Sternberg* v. *Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991).

[3] Claims against some original defendants were settled or dismissed prior to trial and a default judgment had been entered against the ACA. Pet. App. 17a.

Pet. App. 57a-89a. The court found that there was no basis for injunctive relief because the Village of Airmont had not taken any actions that violated the rights of Orthodox Jews in that, since incorporation, it had enacted, but not interpreted, the zoning code. The court stated that, although the differences between the Airmont code and the Ramapo code "arguably could be taken as a signal for a different interpretation," the Village "might not" interpret its code to prevent the use of home houses of worship by Orthodox and Hasidic rabbis for worship services. Pet. App. 19a; Supp. Pet. App. 77a-79a. The court dismissed the case, notwithstanding its acknowledgment that, "[v]iewing the evidence in the light most favorable to the Government, we can foresee that the [Airmont] Planning Board and the Zoning Board of Appeals (to the extent the matter might be submitted to it) will not adopt the Ramapo interpretation of the home professional office exception." Pet. App. 20a. The court also recognized that the absence of actions against the Orthodox and Hasidic Jews in Airmont by the Village or the trustees since the incorporation of the Village could have been caused by the pendency of the instant litigation. *Ibid.* The court concluded that, "if there is any action taken in the future which violates their rights, the United States Government and other plaintiffs will not be timorous about suing. Consequently, we see no basis or need for injunctive relief." *Id.* at 20a-21a. The court believed that injunctive relief, as requested by the United States, to prohibit petitioners from denying persons their constitutional rights "was unnecessary because it would merely enjoin acts that are already illegal." *Id.* at 21a; Supp. Pet. App. 79a.

The district court also denied private respondents any injunctive relief. Pet. App. 21a. Three months after trial, on March 16, 1994, the district court also granted petitioners' motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). Pet. App. 22a; Supp. Pet. App. 51a-56a. The court viewed the jury verdict against the Village as internally inconsistent because the jury had found that the Village had violated the private respondents' FHA rights and conspired to violate their constitutional rights to the free exercise of religion and free speech, but "did not award any damages[,] not even the $1 nominal damages it could have awarded on the civil rights claim." Supp. Pet. App. 52a. The court incorporated in its findings the facts it had found and the reasoning set forth in its decision dismissing the government's suit. *Id.* at 53a. The court also rejected the argument that petitioners' actions had a chilling effect on the respondents' First Amendment rights and concluded that, because the private respondents already had their zoning permits, the worst situation they would face, if the Airmont code were to be interpreted differently from the Ramapo code, would be as a non-conforming use. Pet. App. 23a; Supp. Pet. App. 54a.

3. The court of appeals reversed the judgments dismissing the private respondents' and the United States' claims against the Village.[4] Pet. App. 1a-49a; LeBlanc-Sternberg Br. in Opp. App. A1. The court

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[4] The court affirmed the judgment dismissing the private respondents' suit against the individual defendants and dismissed the cross-appeal of two of the individual defendants as moot. Pet. App. 6a, 44a-46a; LeBlanc-Sternberg Br. in Opp. App. A1.

remanded for an award of nominal damages and injunctive relief in the private suit and for declaratory and injunctive relief in the United States' action. LeBlanc-Sternberg Br. in Opp. App. A-1.

The court held that "the evidence was sufficient to establish that Airmont violated the private [respondents'] rights under the Fair Housing Act and the First Amendment; that the district court was not entitled to set aside the jury's verdict against the Village on those claims on the basis of the court's own findings in the government's action; that in light of the established violation of their rights, the private [respondents] were entitled to an award of nominal damages; that the jury's verdict against the Village constituted collateral estoppel that required the court to find that the government had established a violation by the Village; and that in ruling that injunctive relief was not appropriate, the court failed to apply pertinent [Fair Housing Act] principles." Pet. App. 24a-25a. The court found that, when viewed in the light most favorable to the private respondents, "there was ample support for the jury's implicit finding that Airmont's zoning code would be interpreted to restrict the use of home synagogues, that the motivation behind the enactment was discriminatory animus toward Orthodox and Hasidic Jews, and that Airmont pursued this goal jointly with ACA." *Id.* at 41a. Accordingly, private respondents established the Village of Airmont's liability on their claims under the FHA, the First Amendment, and 42 U.S.C. 1983 and 1985(3), entitling them to nominal damages. Pet. App. 36a-42a. The court ordered the district court to consider whether injunctive relief in favor of private respondents was appropriate in light of the jury's verdict. *Id.* at 44a.

The court of appeals held that the United States was entitled to a declaratory judgment under its FHA claim. Pet. App. 47a-48a. In addition, the court held that the United States was entitled to an injunction "prohibiting the application of the Airmont zoning code in the discriminatory manner found to be predictable from the evidence in this record." *Id.* at 49a.

The court of appeals denied a petition for rehearing on November 11, 1995. Pet. App. 50a.[5]

ARGUMENT

The United States brought suit under the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, in order to prevent the Village of Airmont and its officials from fulfilling their expressed intent to keep Orthodox and Hasidic Jews from living and practicing their religion within the Village. Petitioners do not challenge the merits of the court of appeals' decision under the FHA. There is, indeed, no basis for doing so in light of well-established principles that forbid a government from taking action with the purpose of excluding a class of persons protected by the FHA from residing within its jurisdiction. See, *e.g.*, *United States* v. *City of Parma*, 661 F.2d 562 (6th Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), cert. denied, 422 U.S. 1042 (1975). Petitioners, instead, assert that there is a conflict among the circuits con-

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[5] On remand, the district court entered injunctive relief against the Village in both cases, awarded the private respondents nominal damages and entered declaratory relief in the government's case. *United States* v. *Village of Airmont*, No. 91 Civ. 8453 (GLG), 1996 WL 208307, 208244 (S.D.N.Y. Apr. 25, 1996); *LeBlanc-Sternberg* v. *Fletcher*, No. 91 Civ. 2550 (GLG), 1996 WL 208307, 208302 (S.D.N.Y. Apr. 25, 1996).

cerning the proper standard under the First Amendment for reviewing local zoning actions that involve religious discrimination, and they urge reversal of the court of appeals' ruling on ripeness grounds. Neither of those contentions has merit.

1. Petitioners seek review of the court of appeals' judgment remanding the cases for further proceedings. Pet. App. 6a. This Court ordinarily does not review interlocutory decisions of this type on certiorari. See *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431, 2432 (1993) (opinion of Scalia, J., respecting denial of certiorari), citing *American Construction Co.* v. *Jacksonville, T. & K.W.R.R.*, 148 U.S. 372, 384 (1893); and *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam). The lack of finality of the judgment below is thus "of itself alone" a "sufficient ground for the denial of the [writ]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).[6]

2. Petitioners contend (Pet. 6-10) that the courts of appeals are divided regarding whether the First Amendment requires any accommodation for religious worship that is burdened by local zoning decisions.

Neither of the cases cited by petitioners (Pet. 6-9) as purportedly in conflict with the decision below, *i.e.*, *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303 (6th Cir.), cert. denied, 464 U.S. 815 (1983), and *Grosz* v. *City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984), involved allegations

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[6] As noted above, see note 5, *supra*, the district court has entered its judgments on remand and petitioners may seek further review of those final orders.

of intentional discrimination. Both involved application of neutral laws of general applicability which, under *Employment Div., Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990), "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993).[7]

Lakewood involved a zoning ordinance that prohibited the building of a church in a residential neighborhood. The ordinance prevented the Congregation of Jehovah's Witnesses from being able to build a new church on a lot that it owned. The court emphasized that the ordinance did not have the purpose or effect of prohibiting the Jehovah's Witnesses or any other faith from practicing its religion. 699 F.2d at 307. The ordinance "simply regulate[d] a secular activity and, as applied to the [Congregation], operate[d] so as to make the practice of their religious beliefs more expensive." *Ibid.*, quoting *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961) (opinion of Warren, C.J.). The court in *Lakewood* contrasted the situation there with that in *Keego Harbor Co.* v. *City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981), in which a zoning ordinance had been declared unconstitutional because "its purpose and effect were to eliminate from the city

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[7] This case does not involve a claim under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which was enacted in response to this Court's decision in *Smith*. RFRA restores the compelling interest test, as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), for claims involving governmental action that substantially burdens the exercise of religion, even if the burden results from a rule of general applicability.

the exercise of a first amendment right." *Lakewood*, 699 F.2d at 307.

Similarly, in *Grosz*, there was no contention that the zoning laws at issue were "aimed at impeding religion." 721 F.2d at 733. It was instead uncontroverted that "the law has both secular purpose and effect." *Id.* at 738. The Eleventh Circuit found that the home of the rabbi in which the religious services were sought to be conducted was within four blocks of a district in which publicly attended religious services were permitted, and that services were permitted in one-half of the City's territory. *Id.* at 731, 739.

The Eleventh Circuit in *First Assembly of God of Naples, Florida, Inc.* v. *Collier County*, 20 F.3d 419, modified on other grounds on denial of rehearing, 27 F.3d 526 (1994), cert. denied, 115 S. Ct. 730 (1995), noted the special analysis that is required when a zoning ordinance singles out a particular religious practice for unfavorable treatment. The court contrasted the situation in *Grosz* from that in *Lukumi Babalu Aye*, where the local law was held to violate the Free Exercise Clause because it "target[ed] the use of animal sacrifice for religious purposes." *First Assembly of God*, 20 F.3d at 423. Both *Grosz* and *First Assembly of God* involved enactments of general applicability not motivated by hostility toward religion. The compelling interest analysis applied in *Lukumi* was therefore not applicable. *Id.* at 424.[8]

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[8] In an amendment to its decision, added in the course of denying a petition for rehearing and suggestion of rehearing en banc, the *First Assembly* court noted that RFRA, which was enacted on November 16, 1993, might be applicable to the claims in that case. It declined to address that issue, because it had not been raised by either party. *First Assembly of God of*

Unlike *Lakewood* and *Grosz*, the instant case involves purposeful discrimination based upon religion. The Village of Airmont was incorporated for the purpose of deterring Orthodox Jews from residing in Airmont and the Village conspired to impede the private plaintiffs' exercise of their First Amendment free exercise rights. Pet. App. 36a, 41a. The court of appeals' decision in this case is also consistent with the only decision cited by petitioners (Pet. 8-9) that involved purposeful discrimination against a particular religious group. *Islamic Center of Mississippi, Inc.* v. *City of Starkville*, 840 F.2d 293 (5th Cir. 1988). In that case, the court concluded that the city "favored Christian churches over Muslim mosques" by granting exemptions from its zoning ordinance for every Christian denomination that had applied; the city denied an exemption only to the Islamic group. *Id.* at 294, 297, 302-303.

3. The court of appeals correctly applied settled principles of law in concluding that respondents had standing to bring this action and that injury to respondents was sufficiently impending to warrant injunctive relief. Petitioners' disagreement with the court of appeals' decision focuses on the requirement that the injury complained of by respondents be "actual or imminent." Pet. 12-13, citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990). The decision below, however, was premised on the well-established principle that a plaintiff need not "await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia*,

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Naples, Florida, Inc. v. *Collier County*, 27 F.3d 526 (11th Cir. 1994), cert. denied, 115 S. Ct. 730 (1995). See note 7, *supra*.

262 U.S. 553, 593 (1923). The court of appeals also emphasized that "the victim of a conspiracy to violate First Amendment freedoms has standing to bring suit before the conspiracy has resulted in economic or tangible injury." Pet. App. 30a, citing *Virginia* v. *American Booksellers Association, Inc.*, 484 U.S. 383, 393 (1988) (facial First Amendment challenge to law limiting display of sexually explicit material, prior to law's enforcement, was not premature).

As the court of appeals recognized (Pet. App. 26a), the FHA provides standing to a person who believes he "will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. 3602(i)(2). This provision is based on the well-established principle that "a suit for an injunction deals primarily, not with past violations, but with threatened future ones; * * * an injunction may issue to prevent future wrong, although no right has yet been violated." *Swift & Co.* v. *United States*, 276 U.S. 311, 326 (1928); accord *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1983 (1994) (prisoner facing substantial risk of serious injury is not required to wait for "tragic event" such as actual assault before bringing suit to obtain injunctive relief).

The trial evidence demonstrated the need for judicial intervention in this case. The incorporation of the Village of Airmont, for the expressed purpose of enacting a stricter zoning code than Ramapo's code, in order to exclude Orthodox Jews' home houses of worship (as well as the enactment of the Airmont zoning ordinance itself) were designed to chill the exercise of both First Amendment and FHA rights. See Pet. App. 26a-27a, quoting *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1216 (8th Cir. 1972) (under circumstances similar to those in

this case, court found "[i]t would be futile to require the plaintiffs to proceed any further at the local level").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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